BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
GTE Telephone Operating Companies	)	CC Docket No. 98-79
GTOC FCC Tariff No. 1	)	
GTOC Transmittal No. 1148	)	

OPPOSITION TO PETITIONS FOR RECONSIDERATION

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GTE Service Corporation and its affiliated domestic telephone operating companies (collectively, "GTE"),[1] pursuant to Section 1.106(h) of the Commission's rules, hereby files its Opposition to Petitions for Reconsideration in the above-referenced matter.

I. INTRODUCTION AND SUMMARY

On August 20, 1998, the Commission designated for investigation two issues related to GTE's FCC Tariff No. 1, Transmittal No. 1148: "whether GTE's DSL service offering is a jurisdictionally interstate service" and "whether the Commission should

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[1] GTE Alaska Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., and Contel of the South, Inc.

defer to the states the tariffing of retail DSL services in order to lessen the possibility of a price squeeze." [2]

After extensive pleadings by all parties, the Commission determined that GTE's ADSL service "is an interstate service and is properly tariffed at the federal level."[3] As for claims of a price squeeze, the Commission held that deferring to the states was "neither necessary nor contemplated by the Act." [4] On November 30, 1998, two parties filed Petitions for Reconsideration of the Commission's decision.[5]

The Petitions for Reconsideration raise five issues: (1) the two-call theory; (2) the scope of the Commission's decision; (3) the respective roles of state and federal ADSL regulators; (4) the separations treatment of ADSL; and (5) the precedential impact of the Order at issue. The Petitions should be summarily denied. First, the two-call theory has long been rejected and the Commission's Order addresses this issue in the correct manner. Second, the Commission appropriately limited the scope of its decision to the ADSL service GTE intended to provide. Third, the Commission similarly

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[2] *GTE Telephone Operating Companies, GTOC Tariff FCC No. 1, GTOC Transmittal No. 1148*, Order Designating Issues for Investigation, DA 98-1667, at ¶ 12 (Order Designating Issues for Investigation) (Aug. 20, 1998).

[3] *GTE Telephone Operating Companies, GTOC Tariff FCC No. 1, GTOC Transmittal No. 1148*, FCC 98-292, at ¶ 1 (Memorandum Opinion and Order) (Oct. 30, 1998) ("Order").

[4] *Id.* at ¶ 31.

[5] MCI WorldCom Petition for Reconsideration, CC Docket No. 98-79 (filed Nov. 30, 1998) ("MCI WorldCom Petition"); Request for Clarification and/or Reconsideration of the National Association of Regulatory Utility Commissioners, CC Docket No. 98-79 (filed Nov. 30, 1998) ("NARUC Petition").

made clear that state and federal regulators' respective roles are defined by the nature of the underlying tariffed traffic: here, more than ten percent of GTE's ADSL Internet access traffic is interstate and thus properly federally tariffed. Fourth, the separations claims should be rejected as beyond the scope of this proceeding, duplicative, and speculative. Finally, there is no basis for the Commission to limit artificially the precedential impact of its ADSL Order. For the foregoing reasons, and those set forth below, the Petitions for Reconsideration should be denied.

II. The Long-Discredited Two-Call Theory Should be Firmly and Finally Rejected

MCI WorldCom's petition rehashes the long-discredited two-call approach to determining the proper jurisdiction and urges the Commission to reverse its Order on that basis. The petitioner claims that GTE's ADSL service terminates at the Internet Service Provider's ("ISP's") Point of Presence ("POP") and that the Internet session should be treated as two separate communications: an initial call to the ISP using a telecommunications service, and a second communication using an information service.[6] These are the same arguments that multiple parties, including MCI, raised below.[7] There is nothing new in MCI WorldCom's pleading and it certainly provides no basis for altering the Commission's conclusions.

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[6] MCI WorldCom Petition at 2-8.

[7] *See* MCI WorldCom Comments on Direct Cases ("MCI WorldCom Comments"), at 18-19; Opposition of Hyperion Telecom, Inc. to Direct Cases, at 8-9; Opposition of ITC DeltaCom Communications, Inc. and KMC Telecom, Inc. to Direct Cases, at 3-5; Opposition to Direct Cases of Focal Communications, Inc., at 3-5; Opposition of Splitrock Services, Inc., at 2-3; Opposition of ICG Telecom Group, Inc., at 3-5;

(Continued...)

The Order held that "the Commission traditionally has determined the jurisdictional nature of communications by the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers."[8] Thus, under longstanding precedent, the Commission "regulate[s] an interstate wire communication under the Communications Act from its inception to its completion."[9]

Under this rubric, the Commission rejected both portions of MCI WorldCom's theory, holding that: (1) the communication did not terminate at the ISP POP, and (2) the call could not be subdivided into two calls based on the types of services involved. First, the Commission concluded that GTE's ADSL service did "not terminate at the ISP's local server, . . . but continue[s] to the ultimate destination or destinations, very often at a distant Internet website."[10] Second, the Commission "disagree[d] with those commenters who argue that, for jurisdictional purposes, an end-to-end ADSL communication must be separated into two components: an interstate

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(...Continued)
Opposition of Washington Utilities and Transportation Commission, at 2-5; Opposition of Association for Local Telecom. Services, at 5-6, 15-17. All comments cited in this Opposition were filed in CC Docket No. 98-79 on September 18, 1998, unless otherwise noted.

8 Order at ¶ 17.

9 *Id.* at ¶ 18.

10 *Id.* at ¶ 19.

telecommunications service, provided in this instance by GTE, and an interstate information service, provided by the ISP."[11]

As detailed in GTE's prior pleadings, fifty years of Commission precedent compels the conclusion that a communication must be analyzed on an end-to-end basis in determining jurisdiction.[12] Indeed, the Commission and the courts have uniformly held that it is the nature of the end-to-end communication that determines jurisdiction, not what technology is used, where the equipment is located, or who procured any intermediate piece of the network.[13] The federal appellate courts and the FCC have applied this method of determining jurisdiction across a wide variety of services and have consistently rejected efforts to segment communications into multiple piece parts, regardless of whether multiple services are involved or whether another carrier's or an end user's equipment is utilized in the communication.[14] This precedent is consistent and extensive.

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11 *Id.* at ¶ 20.

12 Direct Case of GTE, CC Docket No. 98-79, at 7-15 (filed Sept. 8, 1998) ("Direct Case of GTE"); Rebuttal of GTE, CC Docket No. 98-79, at 2-12 (filed Sept. 23, 1998) ("Rebuttal of GTE").

13 *See, e.g., United States v. AT&T*, 57 F. Supp. 451, 453-55 (S.D.N.Y. 1944), *aff'd*, 325 U.S. 837 (1945); *National Assoc. of Regulatory Commissioners v. FCC*, 746 F.2d 1492, 1499 (D.C. Cir. 1984); *General Tel. Co. of California v. FCC*, 413 F.2d 390, 397-401 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 888; *see also Puerto Rico Tel. Co. v. FCC*, 553 F.2d 694, 699 (1st Cir. 1977).

14 *See Southwestern Bell Telephone Company*, 3 FCC Rcd 2339, 2341 (1988) (holding that "[s]witching at the credit card switch is an intermediate step in a single end-to-end communication" and thus the jurisdictional nature of the call would be determined by the totality of the underlying communication, not the credit card validation call); *see also Long Distance/USA, Inc. v. Bell Tel. Co. of Pennsylvania,* 10

(Continued...)

More specifically, the Commission has long rejected the two-call theory even when different services are involved in completing the communication. In *Memory Call*, the voice mail service was clearly an enhanced service, while the initial connection between the calling party and the busy or unanswered phone could be characterized as a telecommunications service.[15] Georgia asserted jurisdiction over what it argued was the intrastate enhanced service between the local switch and the voice mail facilities. Bell South countered that, in evaluating jurisdiction, it was the totality of the end-to-end communication that was relevant. The Commission rejected Georgia's argument – similar to MCI WorldCom's argument here that the ADSL communication terminates at the ISP POP – the effect of which would have been to "artificially terminate [the Commission's] jurisdiction at the local switch and ignore the 'forwarding and delivery of [the] communications' to the 'instrumentalities, facilities, apparatus and services' that comprise BellSouth's voice mail service."[16] *Memory Call* went on to stress that the Commission's "jurisdiction does not end at the local switch but continues to the *ultimate* termination of the call . . . ."[17] In short, despite the involvement of multiple services, the Commission still is required to look at the totality of the end-to-end communication.

(...Continued)
FCC Rcd 1634, 1636-37 (1995); *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp.*, 7 FCC Rcd 1619, 1621 (1992) ("*Memory Call*").

15 *Memory Call,* 7 FCC Rcd at 1619, 1620 (1992).

16 *Id.* at 1621.

17 *Id.* (emphasis added).

MCI WorldCom argues that *Memory Call* supports their two-call theory; its efforts twist that holding by conveniently and unsupportably beginning the analysis with the assumption that the ISP's POP is the end point of the call. As set out above, Commission and court precedent do not support this assumption. MCI WorldCom states that "[j]ust as a call from an in-state caller to the Memory Call platform is intrastate, a call from an in-state caller to an ISP POP is also intrastate."[18] Yet MCI WorldCom misses the key point; in *Memory Call,* the communication ended at the platform destination, here the communication's destination is not the ISP POP, but the relevant Internet website. Therefore MCI WorldCom's characterization of *Memory Call*, like its efforts to resuscitate the two-call theory, must be rejected.

III. The Scope of the Commission's Decision Was Appropriate

The Commission's order correctly chose to analyze GTE's ADSL tariff based on the type of service GTE intends to provide: Internet access. Contrary to this common sense approach, MCI WorldCom argues that the Commission erred by not examining the other possible uses of ADSL, asserting that "the Commission did not have to examine any particular use of GTE's ADSL service."[19] This analysis misses the mark. The Commission and carriers tariff actual services, not technology and not hypothetical arrangements. Indeed, here MCI WorldCom is asking the Commission to theorize about possible alternative uses of ADSL and then rule according to those speculative

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18 MCI WorldCom Petition at 7.

19 *Id.* at 8.

facts. Such a ruling is neither necessary nor desirable. The Commission's decision appropriately and narrowly addressed the service to be provided by GTE; nothing more or less is required. In the end, MCI WorldCom seems concerned that ADSL services will be characterized as "inherently" interstate.[20] Yet, the FCC should not be troubled that there are potentially distinguishable fact situations: each service should be analyzed on an end-to-end basis and categorized appropriately. The Commission's decision discharged this obligation and should not be disturbed.

MCI WorldCom is also concerned about the Order's description of Internet traffic as largely interstate in nature.[21] First, GTE has made clear that it is not technologically feasible to jurisdictionally separate this traffic and not a single commenter challenged this conclusion. Second, the characterization is clearly correct because all evidence suggests, and common sense supports, the conclusion that vastly more than ten percent of Internet traffic is interstate.[22] Finally, GTE has assured the Commission that its ADSL service customers will be required to certify that ten percent or more of its traffic is interstate, thus ameliorating any concerns that exclusively intrastate services will be offered through the interstate access tariff.[23] The scope of the Commission's

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20 *Id.* at 9.

21 *Id.*

22 *See* Direct Case of GTE at 15-20; Rebuttal of GTE at 12-13.

23 *See* Rebuttal of GTE at 15.

decision regarding the type of service provided and its interstate nature were valid and should be affirmed.[24]

IV. The Jurisdictional Roles of State and Federal Regulators Are Clearly Defined in the Order

One petitioner seeks clarification of the role of the states in regulating GTE's ADSL service.[25] The Order makes clear the relative jurisdictional roles in tariffing GTE's ADSL service and therefore needs no "clarification." "[F]ederal tariffing of ADSL service is appropriate where the service will carry more than a *de minimis* amount of inseverable interstate traffic. Should GTE . . . offer an xDSL service that is intrastate in nature . . . that service should be tariffed at the state level."[26] Indeed, GTE has stated its intention to adopt a certification process to assure compliance with the *de minimis* requirement and will tariff any intrastate use at the state level.[27] Certainly GTE does not believe that an ADSL tariff "can only be lawfully filed and approved in the interstate jurisdiction."[28] Such a conclusion would be inconsistent with Commission precedent and GTE's position that jurisdictionally mixed services are to be tariffed according to the nature of the underlying end-to-end communications. If such communications are

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24 MCI WorldCom urges the Commission to clarify that GTE's ADSL service is not "inherently" an access service. MCI WorldCom Petition at 9. Yet the Commission correctly found that GTE's ADSL as tariffed was an access service. Order at ¶¶ 21, 25-27.

25 NARUC Petition at 2.

26 Order at ¶ 27.

27 GTE Rebuttal at 15.

28 NARUC Petition at 3.

wholly intrastate, a state tariff is appropriate. If jurisdictionally-mixed communications are more than ten-percent interstate and inseparable, then federal tariffing is appropriate. There is no need for the Commission to revisit this well-established jurisdictional model.

V. Separations Issues Are Not Appropriate for This Docket

NARUC goes to considerable lengths in urging the Commission to clarify the separations treatment of ADSL service.[29] NARUC argues that "the FCC should clarify that the Part 36 separations rules for special access tariffs remain in effect for GTE's tariff until the Separations Joint Board issues a recommendation on any needed revisions and the FCC acts on it."[30] The FCC did not designate any issue with respect to the appropriate separations treatment of ADSL costs. Therefore, this issue is beyond the scope of this proceeding. In addition, as NARUC concedes, these issues are currently pending before the Joint Board.[31] Clearly that venue is the appropriate forum for these issues, not a tariff proceeding. GTE also notes that it has yet to file its first ARMIS report incorporating ADSL. Thus, NARUC's claims are purely speculative. In the interim, GTE will adhere to the Commission's separations rules under the watchful eye of the Commission and the states. Thus there is simply no basis for the

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29 *Id.* at 3-7.

30 *Id.* at 3.

31 *Id.* at 5-6.

Commission to plunge into the quagmire of separations jurisprudence in this proceeding.

VI. The Commission's Decision Should be Given the Same Precedential Impact as Any Other Decision

Finally, one petitioner argues that the Order is too broad and may impact on a series of other proceedings, including universal service and separations.[32] It contends that "the rationale proposed in the order prematurely raises questions best raised, at the earliest, after the Supreme Court issues its decision in the *Iowa Utilities Board v. FCC* appeal."[33] The petitioner then proposes a series of disclaimers that it suggests should accompany the Commission's decision.

There is no basis for this request. First, the Commission's decision addressed the issues in a responsible and limited way. Second, all Commission decisions have precedential impact for similar factual circumstances, and there is no reason to single out this decision for some type of uniquely limiting treatment. Third, the Commission is certainly capable of distinguishing these issues in future decisions, if and when the need arises. Finally, the possible impact of the *Iowa Utilities Board* case does not warrant the entire Commission grinding to a halt to await the Court's decision. Indeed, it is doubtful that *Iowa Utilities Board* will affect this case at all; the remote possibility that it will should not be used to manufacture ambiguity regarding the Commission's Order. The Commission's Order goes out of its way to make clear which issues it

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32 *Id.* at 8-9.

33 *Id.* at 9.

seeks to resolve and which issues will remain open.[34] There is no basis for altering those conclusions.

VII. CONCLUSION

For the foregoing reasons, the Petitions for Reconsideration should be rejected and the Commission's Order left fully intact.

Respectfully submitted,

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January 5, 1999

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[34] *See* Order at ¶ 1-2.

CERTIFICATE OF SERVICE

I, Judy R. Quinlan, hereby certify that copies of the foregoing "Opposition to Petitions for Reconsideration" have been mailed by first class United States mail, postage prepaid, on January 5, 1999 to the parties on the attached list.

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